About Our Businesses

Solutia's portfolio includes ten business units. We compete in three broad segments.

Fibers Segment

***Acrilan* Acrylic Fibers.**
We are North America's largest producer of acrylic fiber, which is used to make finished products such as apparel, craft yarns, upholstery fabrics, and brake fibers.

Carpet Fibers.
We are the world's largest producer of nylon staple fiber and a major supplier of nylon BCF used to make carpeting and rugs under the *Wear-Dated* and *Ultron* VIP brands.

Nylon Industrial Fibers. We produce industrial-strength nylon fibers, which customers use to make finished products such as dental floss, cargo slings, auto airbags and tire cords.

Chemicals Segment

Industrial Products.
We are a leading manufacturer of high performance specialty industrial fluids, including *Skydrol* hydraulic fluids for aviation, *Therminol* heat transfer fluids, and *Dequest* water treatment chemicals.

Intermediates.
We manufacture more than three dozen "building block" chemicals that serve as feedstocks for our various manufacturing processes, or are sold to external customers on the merchant market.

Phosphorus Derivatives.
We are a world leader in developing applications for phosphorus chemistry, including ingredients used in foods and beverages, personal care products and industrial cleaners.

Polymers and Resins Segment

Nylon Plastics & Polymers.
We manufacture nylon 6,6 resin for the engineering thermoplastic and polymer merchant markets, where our products add performance characteristics to finished goods.

Polymer Modifiers.

We manufacture a line of polymer modifiers and specialty plasticizers that help improve the performance of flooring products, sealants, caulks, adhesives and other finished goods.

Resins.
Our line of specialty resins covers a broad range of products such as crosslinkers, flow modifiers, pressure sensitive adhesives, paper surface size, and plastic products.

***Saflex* Plastic Interlayer.**
We are the world's leading producer of polyvinyl butyral, a plastic interlayer used to make laminated glass for automotive and architectural applications.

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A New Beginning . . . A Clear Path Forward

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EMPLOYEE NEWS

Solutia has many advantages over most start-up companies, not the least of which is a track record of success stretching back almost a century. We are proud of our past. At the same time, we embrace independence, and the chance it gives us to build something new. That spirit of purpose is captured in Solutia's mission and corporate priorities.

We will increase shareowner value by applying our knowledge of chemistry to provide creative solutions for our customers.

We will accomplish this by:

1. Meeting Customer Commitments
2. Meeting Financial Expectations
3. Delivering Long-Term, Profitable Growth
4. Engaging Our People, and Rewarding Them
5. Being a Responsible Company

Throughout 1997, we made significant progress on all five counts. In this report, we'll review the highlights of our performance.

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Being A Responsible Company

We Create Value Through Our Commitments To Workplace Safety, Respect For The Environment, And Community Responsiveness.

The leading companies in our industry understand that operating responsibly isn't just a matter of regulatory compliance. It's a strategic business issue.

Over time, responsible companies can, and do, build a competitive advantage when they effectively manage the whole range of environmental, safety, health, employment and community issues. Such companies continue to earn the right to operate from their neighbors. They reduce risks and control operating costs. They may even find new business opportunities in their ability to use resources more efficiently.

VPP "Star" Status
Historically, each of Solutia's businesses has fit the profile of a responsible company. Ten of our manufacturing sites in the United States have achieved "Star" status, a rating that indicates full compliance with standards set by the U.S. Occupational Safety and Health Administration's Voluntary Protection Program (VPP). Two European plants have achieved similar standards under comparable local programs. Other Solutia manufacturing sites are working toward VPP certification.

These voluntary certification activities are proof of the commitment we have made to workplace safety and to the safety of our communities over many decades. We have also consistently worked to strengthen our employee and management teams by including people of diverse backgrounds and experience. Our people have long been active, contributing members of their communities around the world. Since the 1980s, our businesses have led the industry in voluntary waste reductions, in disclosing emissions data, and in cleaning up abandoned waste sites.

This tradition of responsible performance is important on two counts. First, it means that the majority of the spending on environmental matters is behind us.

Second, it means that Solutia is well-positioned to improve on that performance continuously as an independent enterprise. We have a solid foundation in place, and we intend to build on it.

Solutia's businesses have already made many of the investments required to meet our stewardship obligations. (See graph on this page.) In addition, we took aftertax charges of $46 million in the fourth quarter of 1997 to

increase our environmental reserves. Approximately $22 million of these charges reflect revised estimates for previously known environmental matters. The remaining $24 million was due to a modification of our accounting practices to reflect the company's obligations under the Resource Conservation and Recovery Act. We believe that whenever possible, tomorrow's earnings should not be penalized by a legacy of environmental costs associated with yesterday's products. These charges should reduce the impact of environmental remediation on Solutia's earnings over the next several years.

Our Environmental Commitments

In late 1997, the Governance Committee of Solutia's Board of Directors approved a set of six commitments to environment, safety and health. These statements combine to express the company's future direction and framework for operating responsibly.

- We will ensure that our operations and distribution systems are safe for employees, visitors, site contractors, communities and the environment.
- We will make products that are safe when used responsibly.
- We will keep our operations open to our communities and foster open communications with all of our stakeholders.
- We will continuously improve our raw material and energy utilization efficiencies, to reduce our impact on the environment and to improve the sustainability of our businesses.
- We will encourage active participation in and positive contributions to safety, health and environmental stewardship by our employees.
- We will search worldwide for new technologies that bring environmental, safety and health value to all of our stakeholders.

By carrying out these commitments, Solutia expects to match the best practices of our peer companies, and to adhere to the Responsible Care program developed by the Chemical Manufact- urers Association. We consider the commitments a fundamental part of our company. They are integral to our strategy, and they contribute to our business goals.

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Notes to Consolidated Financial Statements

(Dollars in millions, except per share)

Restructuring and Other Actions

Items that affected Solutia's results of operations in 1997 included a first quarter charge of $10 million ($6 million aftertax) associated with the adoption of the SOP 96-1 which is further discussed in Note 16. The second quarter of 1997 included a charge of $10 million ($6 million aftertax) for environmental-related litigation. This charge resulted from a settlement that Monsanto reached with 811 plaintiffs in six lawsuits related to the Brio Superfund site near Houston, Texas. The suits were among eleven suits brought in Harris County District Court or the United States District Court for the Southern District of Texas on behalf of 960 plaintiffs who claimed injuries resulting from alleged exposure to substances present at or emanating from the Brio site. In addition, the second quarter included $8 million ($5 million aftertax) of reversals of excess restructuring reserves from prior years. The excess was primarily the result of lower exit costs associated with the sale and closure of nonstrategic facilities included in 1995 restructuring actions. The fourth quarter of 1997 included charges of $72 million ($46 million aftertax) associated with changes in estimates for environmental remediation liabilities. These charges are discussed further in Note 16.

In December 1996, Solutia recorded pretax restructuring charges totaling $256 million ($164 million aftertax) to cover the costs associated with the closure or sale of certain facilities, asset write-offs, and workforce reductions. Included in these charges were pretax amounts for asset impairments totaling $56 million. These write-offs were necessary primarily because of excess production capacity, coupled with insufficient demand for certain products. Asset values were written down to their discounted cash values, using appropriate discount rates. Significant progress was made on this plan in 1997, with employment being reduced by approximately 600 people.

In December 1995, Monsanto's board of directors approved a restructuring plan. The pretax charge associated with these actions was $66 million ($57 million aftertax) and covered the costs of work force reductions, business consolidations, facility closures, and the exit from nonstrategic businesses and facilities. This plan was substantially completed by the end of 1996 and reduced employment by approximately 100 people.

In December 1994, Monsanto and Akzo Nobel N.V. agreed to form a 50-50 joint venture by combining their respective rubber chemicals businesses. The venture partners agreed to bear the one-time costs

required to integrate their respective rubber chemicals businesses into the joint venture. For Solutia, these integration costs, which totaled $40 million pretax ($25 million aftertax), were primarily for the cost of reducing the work force by approximately 120 people and for special termination benefits for approximately 300 people transferring from Solutia to the joint venture. The charge for these action was recorded in the first quarter of 1995. On May 1, 1995, the joint venture, known as Flexsys, L.P. (" Flexsys"), began operation and is accounted for as an equity affiliate. Accordingly, Solutia's share of the earnings of Flexsys after that date has been reflected in "Equity earnings from affiliates" in the Statement of Consolidated Income. Solutia's results of operations for 1995 included net sales of $140 million from the rubber chemicals business. Operating income for this business during these periods was not significant.

Other items that affected Solutia's results of operations in 1995 included the receipt in the first and third quarters of settlement payments from various insurers related to environmental and other insurance litigation. The combined effect of these settlements totaled $88 million pretax ($55 million aftertax). In addition, Monsanto settled a lawsuit related to a Comprehensive Environmental Response, Compensation and Liability site, commonly known as a "Superfund" site, in La Marque, Texas. The suit was brought by IT Corporation ("IT"), a subsidiary of International Technology Corp., and claimed, among other things, breach of a contract calling for IT to perform incineration and remediation work at the site. Monsanto settled the suit by paying $41 million pretax ($25 million aftertax), and Solutia recorded the payment in the third quarter of 1995.

The components of the pretax expense (income) related to the restructuring programs and the other actions included in the accompanying Statement of Consolidated Income were:

	1997	1996	1995
Changes in estimates for environmental reserves and application of SOP 96-1..	$ 82		
Cost of employee reductions.....		$ 157	$ 22
Shutdown and consolidation of various facilities and departments.....	(8)	33	44
Asset impairments.....		56	
Insurance-related settlement (income).			(88)
Litigation settlement.....	10		41
Joint venture integration costs.....			40
Other costs.....		10	
Total.....	**$ 84**	**$ 256**	**$ 59**

Restructuring expenses are recorded based on estimates prepared at the time the restructuring actions are approved by the board of directors. The balance in restructuring reserves as of December 31, 1997, was $104 million. It is earmarked primarily for work force reduction costs and the costs associated with the consolidation of various facilities and departments. Management believes that the balance of these reserves as of December 31, 1997, is adequate for completion of those activities. Restructuring actions during the last three years have reduced these liabilities by approximately $350 million. Approximately 60 percent of these reductions were recorded for write-offs and expenditures related to the shutdown and consolidation of various facilities and departments. The remaining reductions were related primarily to the cost of work force

reduction programs. As of December 31, 1997, substantially all of the restructuring reserves established in 1995 had been utilized.

The pretax expenses (income) related to the restructuring programs and the other unusual items were recorded in the Statement of Consolidated Income in the following categories:

	1997	1996	1995
Cost of goods sold	$ 84	$ 56	$ (7)
Restructuring expenses - net		192	53
Decrease in operating income	84	248	46
Other expense(1)		8	13
Total decrease in income before income taxes	**$ 84**	**$256**	**$ 59**

(1) In 1996 and 1995, other expense includes Solutia's share of restructuring actions undertaken for the Flexsys joint venture.

Net income was decreased by $53 million, $164 million, and $52 million in 1997, 1996, and 1995, respectively, because of these restructurings and other actions.

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Notes To Consolidated Financial Statements

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Commitments and Contingencies

Commitments, principally in connection with uncompleted additions to property, were approximately $21 million as of December 31, 1997. Solutia was contingently liable as a guarantor for bank loans totaling approximately $12 million as of December 31, 1997. Monsanto was contingently liable as a guarantor for bank loans and discounted customers' receivables relating to Solutia totaling approximately $16 million as of December 31, 1996. Solutia's future minimum payments under noncancelable operating leases and unconditional purchase obligations are $23 million for 1998, $17 million for 1999, $12 million for 2000, $8 million for 2001, $41 million for 2002, and $15 million thereafter.

Solutia has entered into agreements with customers to supply a guaranteed quantity of certain products annually at prices specified in the agreements. In return, the customers have advanced funds to Solutia to cover the costs of expanding capacity to provide the guaranteed supply. Solutia has recorded the advances as deferred credits and amortizes the amounts to income as the customers purchase the products. At December 31, 1997, the unamortized deferred credits were approximately $59 million.

The more significant concentrations in Solutia's trade receivables at year-end were:

	1997	1996
U.S. chemical industry.....	$ 130	$ [illegible]
U.S. carpet industry.....	73	[illegible]
European chemical industry...	41	[illegible]

Management does not anticipate losses on its trade receivables in excess of established allowances.

Solutia's Statement of Consolidated Financial Position included accrued liabilities of $217 million and $150 million as of December 31, 1997 and 1996, respectively, for the remediation of identified waste disposal sites. Expenditures related to remediation activities were $39 million in 1997, $59 million in 1996, and $68 million in 1995. Solutia recorded charges of approximately $34 million ($22 million aftertax) in the fourth quarter of 1997 to increase its environmental reserves. This action was required in order to reflect revised estimates for changed circumstances relating to the ultimate outcome of previously known environmental matters. These

revised estimates were based upon further discussions with environmental authorities and the availability of new information from recently completed environmental studies. These events and activities help to define better and to quantify the company's ultimate liability for these matters.

Effective January 1, 1997, Solutia adopted the American Institute of Certified Public Accountants' Statement of Position ("SOP") 96-1, "Environmental Remediation Liabilities." SOP 96-1 establishes authoritative guidance regarding the recognition, measurement and disclosure of environmental remediation liabilities. A charge of approximately $10 million ($6 million aftertax) was recorded in the first quarter of 1997 associated with the adoption of SOP 96-1. The timing of this charge was predicated upon an application of SOP 96-1 in which liabilities arising under the Resource Conservation and Recovery Act ("RCRA") should be recorded when a RCRA corrective measures study ("CMS") is completed. Subsequently, the company reassessed its application of SOP 96-1 and concluded that these liabilities would be recorded over a continuum of events leading up to and including a CMS. As a result, the company recorded in the fourth quarter of 1997 additional charges of approximately $38 million ($24 million aftertax) associated with these RCRA environmental liabilities.

Uncertainties related to all of the company's environmental liabilities are evolving government regulations, the method and extent of remediation and future changes in technology. Because of these uncertainties, the company estimates that potential future expenses associated with these liabilities could be an additional $20 million to $30 million. Although the ultimate costs and results of remediation of contaminated sites cannot be predicted with certainty, they are not expected to result in a material adverse effect on Solutia's consolidated financial position, liquidity, or profitability in any one year.

Monsanto is a party to a number of lawsuits and claims relating to Solutia, for which Solutia has assumed responsibility in the Spinoff and which Solutia intends to defend vigorously. Such matters arise out of the normal course of business and relate to product liability, government regulation, including environmental issues, and other issues. Certain of the lawsuits and claims seek damages in very large amounts. Although the results of litigation cannot be predicted with certainty, management's belief, based upon the advice of Solutia's counsel, is that the final outcome of such litigation will not have a material adverse effect on Solutia's consolidated financial position, profitability or liquidity in any one year, as applicable.

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solid-waste facilities. Individuals aggrieved by a facility's failure to comply with federal regulations may institute citizen suits against the offending facility owner, and Indian tribes are not exempted from citizen suits. 42 U.S.C. § 6972; *see Blue Legs*, 867 F.2d at 1096–98. The EPA, of course, may also initiate emergency abatement actions if it has evidence that an "imminent and substantial endangerment to health or the environment" exists. 42 U.S.C. § 6973(a). What the EPA complains of is not a "regulatory gap" at all, but the statute's different treatment of states and Indian tribes. Although treating tribes differently from states may be unfair as a policy matter, and may be the result of Congressional inadvertence, the remedy lies with Congress, not with the EPA or the courts. *See American Municipal Power–Ohio v. EPA*, 98 F.3d 1372, 1375 (D.C.Cir.1996) (where EPA's rational interpretation of Clean Air Act provision renders small power utilities unable to take advantage of certain emissions allowances, it is Congress, not the courts, that "can level the playing field").

The Campo Band and the EPA, however, need not wait for Congress to act to give the tribe the flexibility it seeks. At oral argument, all parties agreed that the Campo Band could seek EPA approval for a site-specific regulation, which would satisfy both RCRA and the tribe's desire for flexibility in designing and monitoring a landfill on its reservation. In fact, Campo Band's counsel told us at oral argument that, because the reservation is located in a seismic zone, the tribe may have to seek such a site-specific ruling in order to maintain a landfill facility. *See* 40 C.F.R. §§ 258.13–.14 (regarding placement of solid-waste treatment facilities in fault areas and seismic zones).

We grant the petition for review and vacate the EPA's Notice of Final Determination.

So ordered.

The MEAD CORPORATION, Petitioner,

v.

Carol M. BROWNER, Administrator, and the United States Environmental Protection Agency, Respondents.

No. 95–1610.

United States Court of Appeals, District of Columbia Circuit.

Argued Oct. 21, 1996.

Decided Nov. 12, 1996.

Environmental Protection Agency (EPA) listed three areas as a single National Priorities List (NPL) site, and one area was included based on EPA's aggregation policy. Former owner of that one area challenged listing. On petition for review of EPA's order, the Court of Appeals, Stephen F. Williams, Circuit Judge, held that the EPA could not lawfully use its aggregation policy to list on the NPL a site that did not qualify under the statutorily warranted criteria.

Inclusion of site in EPA's listing vacated.

1. Health and Environment ⇐25.5(5.5)

Environmental Protection Agency's (EPA) listing of area as National Priorities List (NPL) site based solely on EPA's aggregation policy was unlawful where EPA did not produce evidence to warrant listing site under either an Agency for Toxic Substances and Disease Registry (ATSDR) advisory or an Hazard Ranking System (HRS) ranking, or by any designation by the state; aggregation policy could not be used to justify the listing of a noncontiguous site whose listing could not be individually justified by reference to EPA's risk or state designation criteria. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 105(a)(8), as amended, 42 U.S.C.A. § 9605(a)(8); 40 C.F.R. § 300.425(c), (c)(3).

2. Health and Environment ⇐25.5(5.5)

Environmental Protection Agency's (EPA) aggregation policy cannot be used to justify listing a noncontiguous, nonpriority site as a National Priorities List (NPL) site where the listing cannot be individually justified by reference to EPA's risk-related criteria or by state designation; aggregation policy calls for listing noncontiguous facilities on basis of such factors as whether the two areas were part of the same operation, whether potentially responsible parties (PRPs) are the same or similar, whether target population is the same or overlapping, and the distance between the noncontiguous areas. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 105(a)(8), as amended, 42 U.S.C.A. § 9605(a)(8).

On Petition for Review of an Order of the Environmental Protection Agency.

J. Van Carson, Cleveland, OH, argued the cause, for petitioner. With him on the briefs, were Wendlene M. Lavey, Cleveland, OH, and Susan Kerr Lee, Chattanooga, TN.

Alan H. Carpien, Attorney, Environmental Protection Agency, argued the cause, for respondents. With him on the brief, were Lois J. Schiffer, Assistant Attorney General, U.S. Department of Justice, and S. Randall Humm, Attorney, Washington, DC, Environmental Protection Agency.

Before: WILLIAMS, HENDERSON and RANDOLPH, Circuit Judges

Opinion for the Court filed by Circuit Judge WILLIAMS.

STEPHEN F. WILLIAMS, Circuit Judge:

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601–9675, authorizes the Environmental Protection Agency[1] to establish a National Priorities List ("NPL"), identifying high priorities among the nation's known hazardous waste sites. The statute directs EPA to base the listing criteria on "relative risk or danger to public health or welfare or the environment." *Id.* § 9605(a)(8)(A). In preparing the list, EPA is to apply the criteria thus established, and also to accommodate state preferences by including one facility designated by each state among its top 100 priorities. *Id.* § 9605(a)(8)(B). The EPA has duly promulgated risk-based criteria under which a listing is triggered by either a high score on its Hazard Ranking System ("HRS") or by a "health advisory." 40 C.F.R. § 300.425(c). Here, relying on the latter, it has listed three areas as a single site. But one of the three areas—the "Coke Plant Site"—is over a mile away from the rest of the aggregate site. EPA makes no claim either that the Coke Plant Site qualifies for listing under the agency's risk-based criteria or that it has received state designation. Rather, EPA includes the Coke Plant Site only by virtue of its "Aggregation Policy," see Amendment to National Oil and Hazardous Substances Contingency Plan; National Priorities List, 48 Fed.Reg. 40,658, 40,663/3–64/1 (Sept. 8, 1983) ("Aggregation Policy"); see also Hazardous Waste Management System; Identification and Listing of Hazardous Wastes, 49 Fed. Reg. 37,070, 37,076/1–2 (Sept. 21, 1984), which sets forth various factors permitting aggregation of noncontiguous parcels as a single NPL site. The factors named in the Aggregation Policy bear only the dimmest relation to any idea of risk. Mead Corporation, a former owner of the Coke Plant Site, challenges the site's listing. Because EPA cannot lawfully use the Aggregation Policy to list a site that does not qualify under its statutorily warranted criteria, we grant Mead's petition for review.

* * *

The aggregated site, the "Tennessee Products Site," consists of three distinct areas in Chattanooga, Tennessee. The first, the "Creek Site," is a 2.5–mile section of the Chattanooga Creek that has been contaminated by coal-tar wastes dumped into the creek and onto the floodplain near the creek during the 1940s and '50s. National Priorities List for Uncontrolled Hazardous Waste Sites, Proposed Rule No. 16, 59 Fed.Reg.

1. Technically the delegation is to the President, who has subdelegated the authority to the EPA. Exec. Order No. 12,316, 46 Fed.Reg. 42,237 (1981). Exec. Order No. 12,580, 52 Fed.Reg. 2923 (1987).

2568, 2573/2–3 (Jan. 18, 1994) ("Proposed Rule"). According to the EPA, an increase in production while the U.S. Government owned and operated the coke plant during World War II caused a large increase in waste, which in turn "may have strained" the previously established waste handling procedures. *Id.* at 2573/3.

The Creek Site has been listed according to one of the three criteria set forth by EPA pursuant to CERCLA, involving the issuance of a "health advisory" by the Agency for Toxic Substances and Disease Registry ("ATSDR"). EPA adopted this criterion because it decided that its more commonly used risk-based scoring system, the Hazard Ranking System, failed to account for certain risks arising out of direct contact with hazardous substances, and from fire and explosion. Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 48 Fed.Reg. 40,674, 40,676/1 (Sept. 8, 1983). Under the health advisory criterion, the EPA lists sites for which:

> (i) The Agency for Toxic Substances and Disease Registry has issued a health advisory that recommends dissociation of individuals from the release;
>
> (ii) EPA determines that the release poses a significant threat to public health; and
>
> (iii) EPA anticipates that it will be more cost-effective to use its remedial authority than to use removal authority to respond to the release.[2]

40 C.F.R. § 300.425(c)(3). Mead does not dispute this listing, nor that of the second component of the aggregate site, the "Dump Site," which is adjacent to the creek and of which Mead was never an owner.

The third component, the "Coke Plant Site," is located approximately one mile from the creek. The coke plant made tar products, coke, light oils and coal tar from the start of its operations in 1918 until its shutdown in 1987. Mead (or a predecessor corporation) owned the plant for ten of its 69 years of operational history, from 1964 to 1974. The property is currently owned by Hamilton County and the City of Chattanooga.

EPA found that the tar deposits contaminating the creek "in all likelihood" came from operations at the coke plant, see EPA, "Aggregation of the Tennessee Products Site (TND071515959)," June 8, 1993, Joint Appendix at 61, 66, also finding that the majority "were likely" deposited in the period 1926–64, i.e., before Mead's ownership, *id.* There is no evidence that the coke plant continues to contaminate the Creek Site. Although there was once a private sewer line that discharged into the creek, Mead states that the line was abandoned in 1948. Thus, the only relationship between the plant and the creek is history, and, at that, a history that links Mead to the contamination either marginally or not at all.

On August 20, 1993 the ATSDR issued a public health advisory. Although titled the "Tennessee Products Site," the advisory makes clear—and there is no dispute—that it applies only to the Creek Site, not to the Coke Plant Site. The ATSDR supported issuance of the health advisory with evidence that access to the creek was unrestricted and that therefore residents could come into contact with contaminants by swimming or fishing in the creek. In contrast, the Coke Plant Site has been secured and is not accessible to the public.

[1, 2] Admitting that it has not produced evidence to list the Coke Plant Site either because of an ATSDR advisory or an HRS ranking, or any designation by Tennessee, EPA rests the listing of the Coke Plant Site entirely on its Aggregation Policy. That policy calls for listing noncontiguous facilities on the basis of such factors as whether the two areas were part of the same operation, whether the potentially responsible parties ("PRPs") are the same or similar, whether the target population is the same or overlapping, and the distance between the noncontiguous areas. Aggregation Policy, 48 Fed.Reg. at 40,663/3; see also 49 Fed.Reg. at 37,076/1. Mead contends that even if the Aggregation Policy were a lawful basis for listing, the Coke Plant Site does not truly satisfy it. We resolve the issue on the basis of its other claim, however, one that we did not reach in *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1308 (D.C.Cir.1991), because the petitioner had failed to raise it before the agency: namely, that the policy—as used to justify the listing of noncontiguous sites whose listing cannot be individually justified by reference to EPA's risk or state designation criteria—is unlawful.

* * *

Although not arguing that Mead lacks standing to challenge the listing, EPA suggests that we ought not worry about its decision because the NPL is merely a planning tool with "no effect on [Mead's] liability under CERCLA." Respondent's Brief at 20. This circuit has clearly recognized the harmful effects of being linked to a site placed on the NPL. *Bd. of Regents of Univ. of Wash. v. EPA*, 86 F.3d 1214, 1217 (D.C.Cir.1996); see also *Kent County, Delaware Levy Court v. EPA*, 963 F.2d 391, 394 (D.C.Cir.1992) (damage to business reputation, loss of property value and other considerable costs). Listing of the Tennessee Products Site brings Mead within the web of Superfund's cleanup and enforcement scheme. Although EPA does not necessarily initiate cleanup action just because a site is listed, and although the lack of NPL listing does not prevent EPA from taking enforcement action, 40 C.F.R. § 300.425(b)(2) & (4), listing drastically increases the chances of costly activity. EPA stated in this very proceeding that it limits enforcement actions to NPL-listed sites:

> EPA may take enforcement actions under CERCLA . . . regardless of whether the site is on the NPL, although, as a practical matter, the focus of EPA's CERCLA enforcement actions has been and will continue to be on NPL sites.

Proposed Rule, 59 Fed.Reg. at 2570/3. In addition, sites placed on the NPL become eligible for funds from the Superfund for remedial action on the site. 40 C.F.R. § 300.425(b)(1). While the availability of these funds might be seen as only benefitting PRPs, once EPA has funds to clean up a site, it gains bargaining leverage over parties such as Mead. EPA could, for example, propose an expensive remedial operation at the Coke Plant Site (for which Mead's status as a former owner would provide a plausible basis for a claim that it was a PRP, see CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (reaching owner or operator of a facility at a time of disposal of hazardous substances)), and use that threat to pressure Mead to contribute towards cleaning up the creek. Mead's standing is ample.

In promulgation of the Aggregation Policy and in its brief, EPA has claimed support from CERCLA § 104(d)(4), which provides:

> (4) Where two or more noncontiguous facilities are reasonably related on the basis of geography, or on the basis of the threat, or potential threat to the public health or welfare or the environment, the [EPA] may, in [its] discretion, treat these related facilities as one *for purposes of this section*.

CERCLA § 104(d)(4), 42 U.S.C. § 9604(d)(4) (1988) (emphasis added); see also Aggregation Policy, 48 Fed.Reg. at 40,663/3 (asserting support from § 104(d)(4)). But § 104 is not the section authorizing creation of the NPL. Its role is to permit EPA to engage in remedial and removal actions. *Id.* § 9604(a)(1). As § 104(d)(4) explicitly creates aggregation authority solely "for purposes of this section," i.e., § 104, it doesn't help EPA in the exercise of its listing authority under § 105. And it seems quite understandable that Congress would supply broad flexibility for common *treatment* of sites, without giving EPA any comparable discretion to list low-risk sites as if they were high-risk ones.

EPA further relies on the last sentence of § 105(a)(8)(B): "Other *priority* facilities or incidents may be listed singly or grouped for response priority purposes." 42 U.S.C. § 9605(a)(8)(B) (emphasis added). This follows two sentences stating special rules for "highest priority" facilities—first that they be listed individually to "the extent practicable," and second that each state "shall be allowed to designate its highest priority facility only once." *Id.* Presumably the purpose of the requirements is to protect the top

2. Removal action involves cleanup or removal. Remedial actions are those other than removal actions that are designed to prevent or minimize releases so that they do not migrate or cause substantial danger by methods such as storage or containment. 42 U.S.C. § 9601(23) & (24).

priority portion of the NPL from site proliferation. In any event, assuming the sentence on "[o]ther priority facilities" allows the aggregation of noncontiguous sites for NPL listings, it clearly allows such grouping only for "*priority* facilities." Thus it provides no authority for listing a site on criteria other than those specified by statute—namely either state designation or the purely risk-related criteria that EPA has formulated in terms of a high HRS score or a health advisory.

Alternatively, EPA argues that Congress has been "silent or ambiguous" on the issue of aggregation under § 105, so that we should defer to EPA's construction of the statute if it is reasonable. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781–82, 81 L.Ed.2d 694 (1984). But even if we read § 105 as silent on the issue of grouping a priority site with a non-priority one as a single priority site, EPA's Aggregation Policy would be unreasonable as applied here. Permitting the inclusion of low-risk sites on the NPL would thwart rather than advance Congress's purpose of creating a priority list based on evidence of high risk levels.

In fact, as we noted in *Linemaster Switch Corp.*, when Congress detected that EPA's "1982 HRS resulted in the listing of a disproportionate number of high volume, low toxicity hazardous waste sites," 938 F.2d at 1303, it stepped in with the Superfund Amendments and Reauthorization Act of 1986 and required EPA to amend the HRS to make sure that it "accurately assesses the relative degree of risk to human health and the environment posed by sites and facilities subject to review." CERCLA § 105(c)(1), 42 U.S.C. § 9605(c)(1). The idea that Congress implicitly allowed EPA broad discretion to lump low-risk sites together with high-risk sites, and thereby to transform the one into the other, is anything but reasonable.

Section 105(a)(8)(A) provides a lengthy list of appropriate factors:

> the population at risk, the hazard potential . . . , the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, the damage to natural resources which may affect the human food chain . . . , the contamination or potential contamination of the ambient air . . . , State preparedness to assume State costs and responsibilities, and other appropriate factors.

§ 9605(a)(8)(A). EPA does not argue that its Aggregation Policy should be upheld under the closing reference to "other appropriate factors," and we doubt that a factor would be "appropriate" when, by its terms, it causes the listing of low-risk sites. With the exception of the "state preparedness" factor, which relates to state obligations under § 104(c)(3), 42 U.S.C. § 9604(c)(3), all of the factors specified by Congress address the level of risk. In contrast, those of the Aggregation Policy, such as whether the two areas were part of the same operation or have the same PRPs, do not—except by coincidence. Such a use of the catchall phrase at the end of § 105(a)(8)(A) would make a hash of Congress's intended prioritization.

Finally, EPA claims that the Aggregation Policy is of a piece with policies that we have previously upheld—policies declaring that it need not specify precise geographic boundaries in designating NPL sites, and that it can enlarge initial boundaries if additional study reveals a wider scope of contamination. See *Washington State Dep't of Transp. v. EPA*, 917 F.2d 1309, 1311 (D.C.Cir.1990); *Eagle-Picher Indus. v. EPA*, 822 F.2d 132, 144 n. 59 (D.C.Cir.1987). But it is hard to see how our sustaining expansion of initial boundaries to reflect evidence of wider-than-expected contamination is any basis for sustaining extension of a site to include regions where the contamination fails to meet EPA's thresholds. And, while *Eagle-Picher* also approved inclusion of areas that EPA had not specifically sampled, on the basis of samples from adjacent areas, it did so merely as an application of the principle that where the circumstances make it reasonable to draw inferences from a sample, the agency may do so. *Id.* at 141–42. See also *Washington State Dep't of Transp.*, 917 F.2d at 1311–12 n. 6; cf. *Dithiocarbamate Task Force v. EPA*, 98 F.3d 1394, 1399–1400, 1402–03 (D.C.Cir.1996).

Because EPA lacks statutory authority to use its Aggregation Policy to list on the NPL a site that would not otherwise qualify, we vacate EPA's inclusion of the Coke Plant Site within its Tennessee Products Site listing.

So ordered.

NATIONAL TREASURY EMPLOYEES UNION, Appellant,

v.

George J. WEISE, Commissioner, United States Customs Service, Appellee.

No. 95-5149.

United States Court of Appeals, District of Columbia Circuit.

Argued Sept. 30, 1996.

Decided Nov. 19, 1996.

Union for employees of United States Customs Service brought action challenging Customs Service's regulation, defining "customs officer" entitled to receive overtime and premium pay. The United States District Court for the District of Columbia, Gladys Kessler, J., 1995 WL 270812, granted summary judgment for Customs Service commissioner, and union appealed. The Court of Appeals, Randolph, Circuit Judge, held that Customs Service regulation, while perhaps superfluous, conformed to statute, providing term "customs officer" means individual performing those functions specified by regulation by Secretary of Treasury for customs inspector or canine enforcement officer, and reflected most sensible interpretation of how congress meant to have eligibility for overtime and premium pay determined under statute.

Affirmed.

Customs Duties ⇐54

Customs Service regulation defining "customs officer" entitled to receive overtime and premium pay as including individuals assigned to positions of customs inspector, supervisory customs inspector, canine enforcement officer or supervisory canine enforcement officer, while perhaps superfluous, conformed to statute, providing term "customs officer" means individual performing those functions specified by regulation by Secretary of Treasury for customs inspector or canine enforcement officer, and reflected most sensible interpretation of how congress meant to have eligibility for overtime and premium pay determined under statute. 19 U.S.C.A. § 267(e)(1); 19 C.F.R. § 24.16(b)(7).

Appeal from the United States District Court for the District of Columbia (94cv00163).

Elaine D. Kaplan argued the cause for appellant. With her on the briefs was Gregory O'Duden. Clinton D. Wolcott entered an appearance.

Fred E. Haynes, Assistant United States Attorney, argued the cause for appellee. With him on the brief were Eric H. Holder, Jr., United States Attorney, R. Craig Lawrence and Michael J. Ryan, Assistant United States Attorneys.

Before: WILLIAMS, GINSBURG, and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge Randolph.

RANDOLPH, Circuit Judge:

The National Treasury Employees Union is the bargaining representative for employees of the United States Customs Service, an agency within the Department of the Treasury. The union brought this action to challenge an interim rule of the Customs Service defining a "customs officer" entitled to receive overtime and premium pay under 19 U.S.C. § 267, as revised in 1993.[1] The dis-

1. The union filed suit shortly after promulgation of the interim rule on January 1, 1994. 58 Fed. Reg. 68,520, 68,523 (1993). The rule became final in October 1994 while this litigation was pending in the district court. 59 Fed.Reg. 46, 752 (1994).